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IN THE

Supreme Court of the United States

October Term, 1940.

No. 644.

THE H. W. GOSSARD CO., *Petitioner,*

v.

LOEBER'S, INC., *Respondent.*

Petition for a writ of Certiorari and Brief in Support Theroef.

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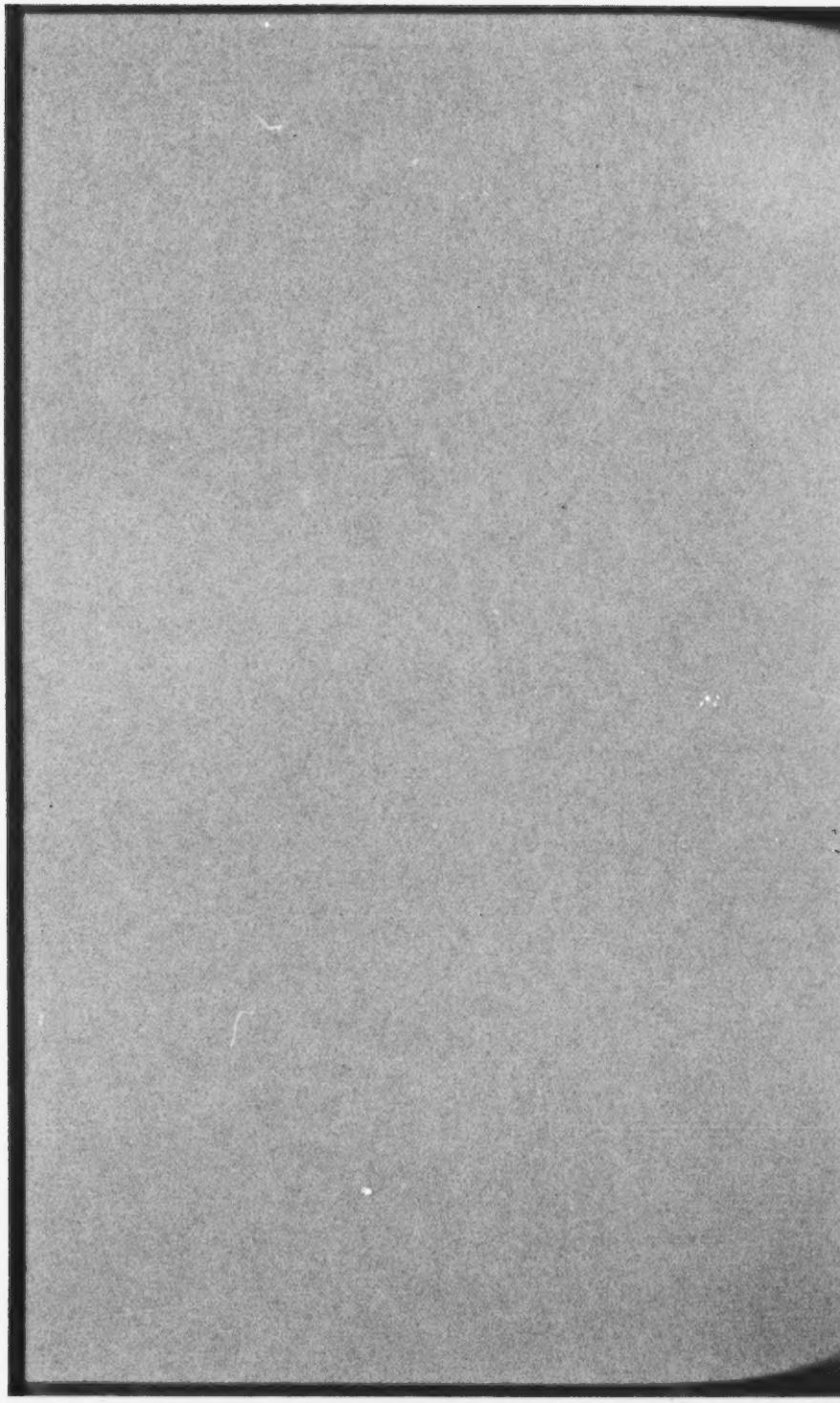

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IN THE

Supreme Court of the United States.

No. . October Term, 1940.

THE H. W. GOSSARD CO.,

Petitioner,

v.

LOEBER'S, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, The H. W. Gossard Co., respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on June 24, 1940 (rehearing denied September 24, 1940), reversing a decree of the United States District Court for the Northern District of Illinois, Eastern Division (Barnes, J.) adjudging the two patents of petitioner in suit valid and infringed.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Petitioner, The H. W. Gossard Co., brought this suit in the United States District Court for the Northern District of Illinois, Eastern Division, for infringement by respond-

ent, Loeber's, Inc., of the following United States Letters Patent owned by petitioner:

Patent No.	*Patentee*	*Claims*	*Application Filed*	*Patent Issued*
1,859,198	Cunningham	3-8 inc.	8/29/30	5/17/32
1,899,890	Cunningham	1	3/30/32	2/28/33

The District Court held the claims in issue of both patents valid and infringed and entered its decree awarding petitioner an injunction and an accounting (R. II, 578).

On appeal, the Court below reversed the decree of the District Court, holding the claims invalid for want of invention (R. II, 897). Rehearing was denied September 24, 1940 (R. II, 902).

Respondent at no time has denied infringement, if the claims are valid, and both Courts below have so found and held (R. II, 579, 890).

The patents in suit relate to women's foundation garments, and more particularly to a combination corset and brassiere, so designed and constructed as to support, mold and control the figure of the wearer by the application of mechanical pulls and forces.

Because the functions of these garments are truly and strictly mechanical, they are radically and fundamentally different from all other articles of wearing apparel, and must, therefore, be judged by function and not appearance.

The invention of the first or basic patent, No. 1,859,-198, may be most readily understood by reference to the drawings thereof (R. II, 592), which are reproduced upon the opposite page. The integrated combination garment there shown comprises a lower or corset part 5 to which the front portion 15 of the upper or brassiere part is sewn.

May 17, 1932. K. E. CUNNINGHAM 1,859,198

COMBINATION GARMENT

Filed Aug. 29, 1930

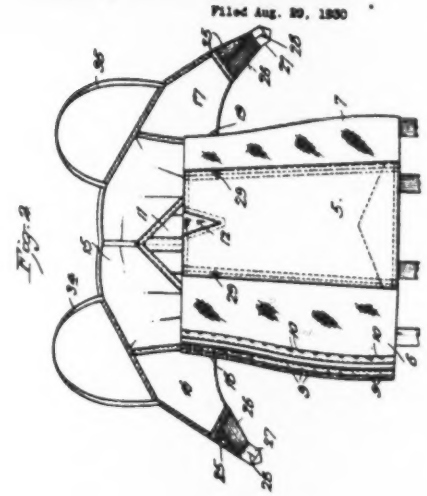

Fig. 2

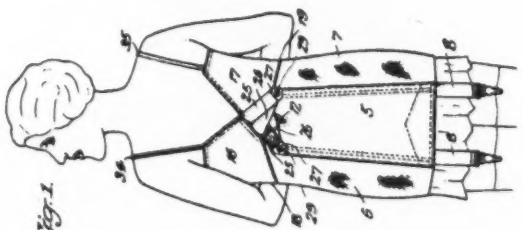

Fig. 1

INVENTOR
KATHERINE E. CUNNINGHAM
BY [signature]
ATTORNEY

To the ends of the front portion of the brassiere part and down the sides of the garment at 18 and 19 to a point adapted to lie below the diaphragm are sewn "end sections" or flaps 16 and 17 which extend rearwardly to overlie the back of the wearer. To the free end of each end section are secured elastic straps 25 and 26 terminating in a tab 27 having a fastening means such as a buttonhole 28 by which it is attached to the back of the lower portion of the garment. The end sections of the garment of Claims 3, 4, 5 and 7 of the patent and of the garments of both petitioner and respondent are crossed at the back.

In the preferred form of the garment, the elastic straps 25 and 26 attached to each end section diverge from the tab 27, in the form of a substantially horizontal V, so that the lower strap 26 of each pair is adapted to exert a pull along the lower part of its adjacent end section and across that portion of the corset adapted to cover the diaphragm and abdomen, while the upper strap 25 of each pair is adapted to exert a pull along the upper portion of its adjacent end section and across the upper part of the front portion of the brassiere. Shoulder straps 34 and 35, preferably of elastic material, are attached to the front portion 15 and to the end sections 16 and 17 respectively of the brassiere, so that the garment, when worn with garters 8 of elastic material attached to the stockings, will be kept in position yet permit freedom of movement of the wearer.

Claim 4, which is typical of the claims in issue of the first patent, is set out in the margin.[1]

---

[1] "4. A combination garment comprising a corset and a brassiere, said brassiere comprising a front portion adopted to cover the body across the busts and being sewn to the upper edge of the corset, end sections terminating in pairs of elastic straps, said end sections being sewn to

In the invention of the second patent in suit, No. 1,899,-890, the application for which was co-pending with that which eventuated in patent No. 1,859,198, a third and shorter horizontal strap 47 (as illustrated in Figure 4 of the second sheet of the drawings of that patent set opposite) is attached at a point intermediate each set of diagonal elastic straps and the end section of the brassiere portion of the garment. The shorter horizontal strap exerts a pull across the lower front edge of the brassiere and the upper edge of the front section of the corset in the region of the diaphragm, the construction being such that the various elastic straps come into play consecutively under different conditions of tension.

Claim 1 of Patent No. 1,899,890, which is the only claim of that patent in suit, is set out in the margin.[2]

---

said front portion and down the side of the corset to about the waistline and adapted to be crossed at the back, shoulder straps attached to the front portion and the end sections, and means for fastening said pairs of elastic straps to the back of the corset, said straps in each pair diverging from the point adapted to be fastened to the corset so that one strap of each pair is adapted to exert a pull along the lower edge of its adjacent end section and across that portion of the corset adapted to cover the diaphragm and the other strap of each pair is adapted to exert a pull along the upper edge of its adjacent end section and across the upper part of the front portion of the brassiere adapted to cover the body above the busts."

[2] "1. A foundation garment comprising a brassiere adapted to cover the body across the busts and a connected front section adapted to cover the diaphragm and abdomen, flaps secured to the sides of said brassiere and down the sides of said front section to about the waist line, sets of elastic straps attached to the outer ends of said flaps and including an upper diagonal strap arranged to exert a downward pull on the upper front edge of the brassiere, a lower diagonal strap connected to the upper strap and diverging therefrom at an angle to exert an upward pull

Feb. 28, 1933. K. E. CUNNINGHAM 1,899,280

FOUNDATION GARMENT

Filed March 30, 1932 2 Sheets-Sheet 2

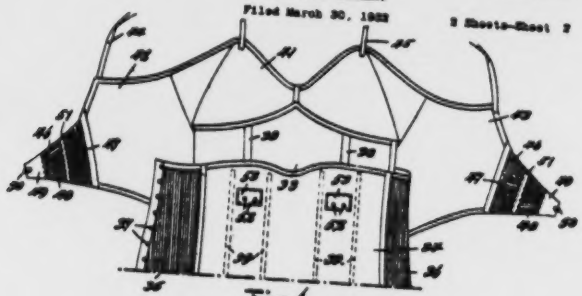

Fig. 4.

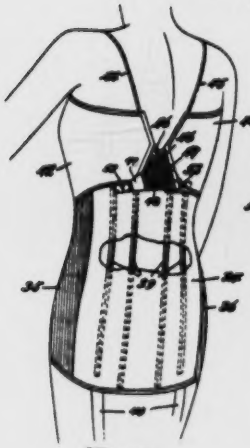

Fig. 8.

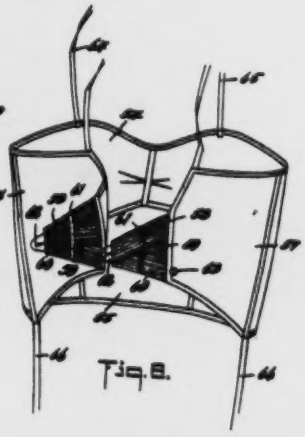

Fig. 8.

INVENTOR
KATHERINE E. CUNNINGHAM
BY
ATTORNEY

Objects sought and accomplished by the inventions are to "mold the figure throughout" (R. II, 593, line 4); to confine and mold correctly "the busts and the abdomen", (R. II, 593, lines 6-7); to confine the busts and give them "a correct uplift form", (R. II, 593, lines 49-50) without exerting uncomfortable pressure on the busts, (R. II, 593, lines 47-48); to provide "a flexible control adapted to accommodate itself to variations in the measurements of different individuals", (R. II, 601, lines 15-18); and to distribute increased tension uniformly over the portions of the garment, and the body of the wearer where it is most desired (R. II, 601, lines 53-55).

At the trial it was demonstrated and shown that stock garments of the same size made in conformity with the patents in suit adjust themselves with comfort to figures of different proportions though of the same general size. It was likewise shown by demonstration that the forces contributed by the elastics attached to the end sections of the garments of the claims in suit radiate from the point at which they are fastened to the back of the garment in such a manner as to exert an additional control and uplift over the abdominal region, the waist line and the diaphragm of the wearer, and help support, without compressing, the busts. (R. I, 34-42.)

The patents in suit are not paper patents. From 1930 to March 1, 1939, petitioner sold upwards of three million

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on said front section in the region of the abdomen, and a shorter horizontal strap secured to an intermediate portion of said diagonal straps in position to exert a pull across the lower front edge of the brassiere and the upper edge of said front section in the region of the diaphragm, and means for holding said straps under tension at the back of the garment."

garments made under one or both of the patents in suit (R. I, 44-45).

The garment of the second patent was first made April 22, 1931 (R. I, 96-97; PX35, 35-A).

Of forty-two patents and publications put in evidence by respondent in an attempt to show want of invention in the patents in suit, but two need now be considered. They are the so-called "Princette" publication (R. II, 533, 535), and the Patent to Kops No. 1,833,325 (R. II, 814).

Neither was regarded by the District Court as foreshadowing the inventions of the patents in suit. With respect to the Princette publication,[3] the District Court, in its opinion (R. II, 564), said:

> "Now, about the only—the chief similarity between that garment shown there, that Princette garment, and the plaintiff's exhibit made in accordance with its patent, is they both have two buttons on their back. It is most striking. That is the thing that first strikes the eye. I cannot see how there could be any force. In the first place I do not see that there is any elastic to make any force there. From that button in that picture in 209, how can there be any force applied to the abdomen? As a matter of fact, in that 209 Princette the straps come over the shoulder and down to those two buttons, and the lace brassiere is just carried over to the strap, that's all. That is what that is. There is no force applied from that. There, you have not the application of any force, as I can see it, except the force which holds, or goes to the strap up over the shoulder."

Upon that matter, the District Court found (R. II, 576):

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[3] For convenient reference, the two sheets comprising the Princette publication are set out in an appendix hereto.

"(84) The 'Princette' publication, the last item in Defendant's Exhibit 8, does not disclose a garment structurally or functionally like the garments of the patents in suit and does not anticipate the claims in suit."

Completely ignoring these views and findings by the District Court, the Court below, on appeal, made the following startling finding of fact with respect to the Princette garment:

"It has the end sections which are sewed down on the sides of the corset to the waist line, and converge in the back and *terminate in elastics. Moreover, there is one elastic on each side; they diagonally cross;* and each is buttoned to the back of the garment, as in Cunningham."[4]

The only evidence in the record pertaining to the Princette garment is that which appears in the Princette publication itself. One has only to glance at the illustrations appearing therein (R. II, 533, 535) to see that *on neither of those pages is there any disclosure of end sections which "terminate in elastics". There is on neither of those pages any disclosure that there "is one elastic on each side". And each of those pages shows quite clearly that neither the end sections nor the terminations thereof cross diagonally or otherwise.*

Speaking of the Kops patent, the District Court in its opinion (R. II, 563-64) said:

"* * * you have one of those girdles or step-ins, and you have a brassiere; and again I say there is no cooperation between those two garments except, as far

[4] Italics throughout the petition and brief are counsel's unless otherwise indicated.

as I can see, the brassiere is brought down a bit over the top of the corset so as to prevent folds of fat, if there are any, from rolling out over the top of the corset, and the corset does prevent, I suppose, the brassiere from slipping up.

"I cannot believe, counsel, for the defendant to the contrary notwithstanding, that there is any purpose in the invention to apply any force, any appreciable force in uplifting the abdomen or to restraining the diaphragm, or even to restraining the portion of the body above the breasts.

"That Fig. 44, on page 2, line 55, refers to:

> 'Extending from the extremity of the strap there is a tape 44 preferably made of elastic or other yielding material fitted at its free end with a button 45 adapted to engage in the button hole 37.'

"Now, then, it says:

> 'In order to maintain the tape 44 in position to prevent the central portions of the straps 34 and 41 from working upwardly, the tape 44 may be threaded through a loop 46 before the button 45 is caused to engage in the button hole 37.'

"Now, the only purpose of anchoring that tape, even though it be an elastic tape, is to prevent those two parts, adjoining parts, from working upward. Nothing said there about applying any force to the abdomen or diaphragm or to any other part of the body."

With respect to the Kops Patent, the District Court made its findings of fact Nos. 76-82 inclusive (R. II, 576).[5]

[5] Respondent did not adduce any testimony or evidence, expert or otherwise, with respect to the Kops patent. The disclosure of that patent (R. II, 814-819) and

From the decree thereupon entered by the District Court awarding petitioner an injunction and an accounting, respondent appealed to the Court below; and that Court, basing its decision solely upon the same Kops Patent No. 1,833,325 and the Princette publication, held the patents in suit invalid for want of invention and reversed the decree of the District Court.

In so doing, the Court below not only disregarded and set aside the findings of the District Court without pointing out wherein the evidence failed to support such findings, but substituted for the findings of the District Court findings of its own which are wholly without foundation in the record.

Moreover, in construing the Kops patent and the Princette publication, the Court below departed from the actual disclosures of those references and read into them modifications, the only basis for which is found not in the prior art but in the teachings of the patents in suit.

Petition for rehearing, pointing out these errors by the Court below, was denied by the Court below without opinion on September 24, 1940 (R. II, 902).

QUESTIONS PRESENTED.

(1) Whether Rule 52 (a) of the Federal Rules of Civil Procedure, providing that "Findings of fact shall not be set aside unless clearly erroneous", does not make it mandatory upon the Circuit Court of Appeals to accept the findings of the District Court, in the absence of a deter-

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the testimony of petitioner's expert with regard thereto (R. I, 109; 116-119) therefore stand unchallenged and uncontroverted in the record of the case at bar, and it is upon that disclosure and testimony that the findings of the District Court are based.

mination by the Circuit Court of Appeals that such findings are unsupported by, or contrary to the weight of, the evidence.

(2) Whether, under Rule 52 (a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals is justified in setting aside and ignoring the findings of the District Court, without first determining that such findings are "clearly erroneous".

(3) Whether, under Rule 52 (a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals is, without giving any consideration whatever to the findings of the District Court, justified in setting aside such findings and in substituting therefor findings of its own.

(4) Whether the Circuit Court of Appeals, in any event, is justified in substituting for the findings of the District Court findings of its own which are wholly without foundation in the record or evidence before it.

(5) Whether the Circuit Court of Appeals is justified in departing from the actual disclosures of certain alleged prior art references and the uncontradicted testimony with respect thereto, and in reading into such references modifications or amendments thereof, the only basis for which is found in the teachings of the patents in suit and nowhere in the prior art.

(6) Whether Claims 3 to 8 inclusive of Patent No. 1,859,890 and Claim 1 of Patent No. 1,899,198 are valid.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant the writ of certiorari is invoked upon the following grounds:

(1) Rule 52 (a) of the Federal Rules of Civil Procedure, which have, by Statute, the force of law, provides that "Findings of fact shall not be set aside unless clearly erroneous". Yet the Circuit Court of Appeals in this case reversed the decree of the District Court made mandatory by the findings of fact of that Court, without adjudging those findings "clearly erroneous"; and thereby the Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

(2) In reading into an alleged prior art patent and publication certain modifications not disclosed therein, the only basis for which is found in the disclosures and teachings of the patents in suit and nowhere in the prior art, the Court below has decided a federal question in a way probably in conflict with an applicable decision of this Court.

(3) In reading into an alleged prior art patent and publication modifications whose only basis is found in the inventions of the patents in suit and nowhere in the prior art, and in thereupon using such modified prior art references to invalidate the patents in suit, the Court below has rendered a decision in conflict with decisions of other Circuit Courts of Appeals upon the same important question of federal law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of

Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Circuit Court of Appeals, in the case numbered and entitled on its docket No. 6995, "The H. W. Gossard Co. v. Loeber's, Inc.," to the end that this case may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals for the Seventh Circuit be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem meet and proper.

THE H. W. GOSSARD CO., Petitioner,
By HUGH M. MORRIS,
FREDERIC BURNHAM,
DONALD MALCOLM,
Counsel for Petitioner.

Brief in Support of Petition.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is set forth at R. II, 557. It has not been reported. The findings of fact and conclusions of law of the District Court are set forth at R. II, 566-578.

The opinion of the Circuit Court of Appeals (R. II, 890) is reported in 114 F. (2d) 166.

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347 (a)).

(b) The judgment or decree of the Court below, review of which is sought, is dated June 24, 1940 (R. II, 897). The order denying petition for rehearing in the Court below was filed September 24, 1940 (R. II, 902).

(c) Cases believed to sustain the jurisdiction of this Court to grant the writ of certiorari in the instant case are:

Rice & Adams v. Lathrop, 278 U. S. 500, 512;
Douglas v. Cunningham, 294 U. S. 207, 209;
Prudence Co. v. Fidelity Co., 297 U. S. 198, 205;
Duparquet Co. v. Evans, 297 U. S. 216, 217;
Appliance Co. v. Equipment Co., 297 U. S. 387, 392.

III.

STATEMENT OF THE CASE.

The nature of the case is stated in the petition and in the interest of brevity will not here be repeated. Further reference to the decision of the Circuit Court of Appeals, which may be necessary to show the position taken by that Court with respect to the several questions here presented, will be made in the ensuing argument.

IV.

SPECIFICATION OF ERRORS.

The errors which petitioner will urge, if the writ of certiorari is granted, are that the Circuit Court of Appeals for the Seventh Circuit erred:

(1) In ignoring the findings of fact of the District Court with respect to the Princette publication and the Kops Patent No. 1,833,325, in violation of the mandatory provision of Rule 52 (a) of the Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous."

(2) In disregarding and setting aside the findings of fact of the District Court without adjudging that such findings are "clearly erroneous."

(3) In substituting for the findings of fact made by the District Court, findings of its own which are nowhere supported by the record or evidence in the cause.

(4) In departing from the disclosures of the Princette publication and the Kops patent, and in reading into those references certain modifications thereof, possible only in the light of the teachings of the patents in suit, and in thereupon using such modified and reconstructed references to

invalidate the patents in suit on the ground of want of invention.

(5) In not holding Claims 3 to 8 inclusive of Patent No. 1,859,198 and Claim 1 of Patent No. 1,899,890 valid and infringed.

(6) In reversing the decree of the District Court.

SUMMARY OF ARGUMENT.

The points of the argument will be taken up in the order of their statement under the Reasons Relied On for Allowance of the Writ (Petition, p. 11). For the sake of brevity, they are not repeated at this point.

ARGUMENT.

Point 1. Rule 52(a) of the Federal Rules of Civil Procedure, Which Have, by Statute, the Force of Law, Provides That "Findings of Fact Shall Not Be Set Aside Unless Clearly Erroneous". Yet the Circuit Court of Appeals in This Case Reversed the Decree of the District Court Made Mandatory by the Findings of Fact of That Court, Without Adjudging Those Findings "Clearly Erroneous"; and Thereby the Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

Without so much as indicating in its opinion wherein it deemed the evidence to be insufficient to support, or even in conflict with, the findings of fact made by the District Court with respect either to the patent in suit, the Princette publication or the Kops Patent No. 1,833,325, the Court below nevertheless disregarded and set aside those findings. Indeed, the Court below did not even refer to the *findings* of the District Court. Instead it substituted therefor independent findings of its own, which are not only unsupported by any finding of the District Court but which are in irreconcilable conflict with the uncontradicted evidence on which the findings of the District Court were based.

Thus, for example, the Court below, holding that the Princette garment "we think clearly anticipates both of the Cunningham patents" (R. II, 895), said:

> "It has the end sections which are sewed down on the sides of the corset to the waist line, and converge in the back *and terminate in elastics.* Moreover, *there is one elastic on each side; they diagonally cross;* and each is buttoned to the back of the garment, as in Cunningham."

But, from even a casual inspection of the Princette publication (which is the *only* evidence in the record with respect to the Princette garment), it is manifest that the Princette publication does not disclose or even remotely suggest the *structure* or *function* of the garments of the Cunningham patents here in suit. The sole purpose of the Princette garment was to provide a low back combination to serve as the correct foundation for what the publication itself called the "Princess Silhouette", and the only figure control which it purported to accomplish was provided by special seaming and boning. Thus, the descriptive matter accompanying the illustration of the Princette garment expressly states (R. II, 535):

> "The lines of the brassiere are so cut that an *extremely low decolletage* is possible without sacrifice of the necessary restraining qualities. *Clever seaming and boning control the figure admirably.*"

Moreover, there is, in the Princette publication, nothing whatever to show that the side sections of the brassiere have attached to their ends *any elastic whatever* or that there is *one elastic on each side.* On the contrary, the illustration of the Princette garment makes manifest that the tabs attached to the end sections are merely tabs for providing a buttonhole to secure the end sections in position at the back, while the garment is being worn, *and that the tabs do not cross, diagonally or otherwise.*

Based upon the clear and unequivocal disclosures of the Kops Patent No. 1,833,325 (R. II, 814-819), and the unchallenged and uncontroverted testimony of petitioner's expert, Mr. Marine (R. I, 109, 116-119), the District Court (R. II, 576) made the following findings of fact with respect to that patent:

"(79) Though some of the garments of the prior art, for example, that of Kops Patent No. 1,833,325, have vertical elastic panels, none discloses auxiliary forces supplied by the elastic straps, of the patents in suit, attached to end sections of a brassiere sewed to the front and down the sides of the garment to hold the front portion of the brassiere snugly against the body of the wearer, above and below the bust, without exerting pressure on the bust, while at the same time flattening the diaphragm and supporting the abdomen.

"(80) The element 44 in Figure 2 of Kops Patent 1,833,325 is but an elastic fastening means of the elements of the non-elastic straps 34 and 41, and was not designed or intended as an auxiliary force to mold the bust, flatten the diaphragm or support the abdomen.

"(81) In Kops Patent No. 1,833,325 neither the elastic 44 nor the non-elastic straps 34 and 41 are fixedly anchored to the corset as are the elastic straps of the Cunningham patents in suit, and so cannot produce, apply and distribute tensions and forces as do the structures of the patents in suit.

"(82) The non-elastic straps 34 and 41 of Kops Patent No. 1,833,325 are so attached to the corset that even were the force of elastic tape 44 very greatly increased, that force would be applied circumferentially instead of radially, as in the structures of the claims here in suit."

Yet the Court below, in clear defiance of these findings of the District Court, which were made mandatory by the evidence, and without in any way disturbing such findings or attempting to show that they were "clearly erroneous", made its own independent findings with respect to the Kops Patent No. 1,833,325.

Thus, to point out but a few of the many arbitrary and unwarranted findings by the Court below with respect to

Nov. 24, 1931

W. KOPS

1,833,325

APPAREL GARMENT

Filed April 15, 1930

2 Sheets-Sheet 1

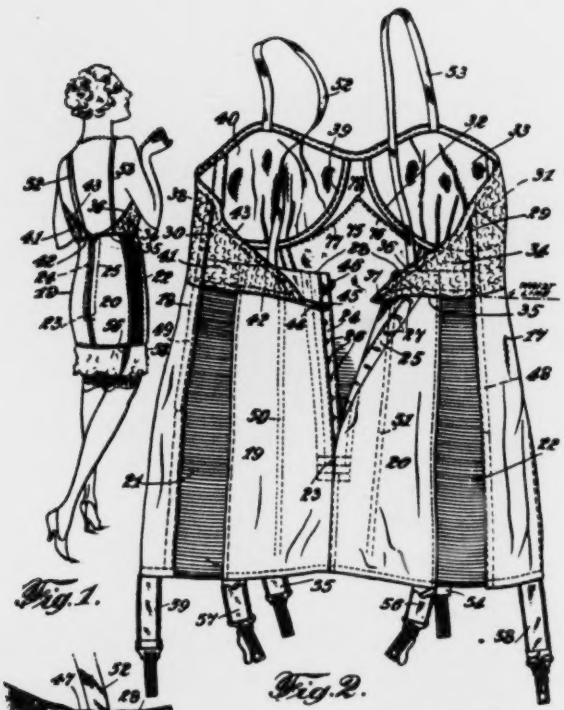


Fig. 1.

Fig. 2.

Fig. 5.

INVENTOR
Waldemar Kops
BY
H. G. Strauss
ATTORNEY

the Kops Patent, that Court, in its opinion (R. II, 892-3) said:

> "It is obvious that the Kops *construction* differs from Cunningham *only* in the fact that the former makes his triangle of cloth, which is the flap itself, to which he attaches one strip of elastic which engages a button on the free end of the other flap, whereas Cunningham constructs her triangle with the elastics, and her tabs which are attached to the respective points of the triangles engage buttons which in turn are attached to the corset. These buttons prevent the flap from working upward, while in Kops the same result is obtained by threading the elastic through a loop which is attached to the corset."

But in addition to that which the Court below referred to as the *only* difference between Kops [1] and Cunningham, there are at least seven other fundamental differences in construction, viz.:

(1) The "end sections" of Cunningham are sewed to the *front* portion of Cunningham's garments (R. II, 593, lines 71-78; R. II, 601, lines 28-32), whereas the "straps" of Kops (R. II, 818, lines 22-24, 45-48) are attached to the *rear* edge of the upwardly extending *side members* of his garment (R. II, 818, lines 11-13).

(2) The "side members" of Kops (to the lower rear edge of which he attaches his straps) extend above the upper edge of the back of the girdle (R. II, 818, lines 11-16) whereas Cunningham's are confined within the dimensions of the girdle (R. II, 592; Fig. 2; R. II, 600, Fig. 4).

---

[1] For convenient reference, Sheet 1 of the drawings of Kops Patent No. 1,833,325 is set out upon the opposite page.

(3) Kops connects the adjacent ends of his "straps" with a tape, elastic or non-elastic, whereas the end sections of Cunningham are not connected.

(4) The "straps" of Kops are not crossed. The "end sections" of Cunningham are "crossed at the back." (R. II, 593, line 18).

(5) Along the rear edges of his side members, which extend above the top edge of the back member of his garment, Kops provides "stays" (i. e. strips of steel) (R. II, 818, lines 86-89).

Cunningham has no side members extending above the upper edge of the back member of her garments, and also has no such upwardly extending steel stays.

(6) In Kops, the lower edge of his "straps" extends "circumferentially of the garment" (R. II, 818, lines 48-51), and the "straps" are connected by a "horizontally extending tape" (R. II, 819, lines 53, 54); whereas, in Cunningham, her "end sections" are sewed to the *front* portion of the brassiere and down the side of the *front* of the corset to a point *below* the diaphragm of the wearer (R. II, 593, lines 71-75); and her *elastic* straps are so divergently arranged and so anchored as to give "an uplift form to the figure" (R. II, 594, lines 17-21), to "hold the diaphragm of the wearer flat" (R. II, 594, lines 8-9), to "confine and mold the abdomen" (R. II, 593, lines 6-7), and to hold the brassiere "above the busts snugly against the body of the wearer without exerting uncomfortable pressure *on the busts*" (R. II, 594, lines 9-12).

(7) The elastic straps of Cunningham are anchored at the back of her garment (R. II, 593, lines 80-83). The tape 44 connecting the straps of Kops is not attached to

the back of his garment save by a loop through which it is at all times free to move, and the sole purpose of which is to prevent the central portions of the straps 34 and 41 from working upwardly (R. II, 818, lines 59-64).

These additional differences in structure between the garment of Kops and the garments of Cunningham are not insignificant or immaterial. They have a most material effect upon the function and results of the two structures. As respondent uses the Cunningham structure in the precise form described and shown in the patents in suit, that precise structure must inevitably be necessary. *Diamond Rubber Co. v. Consol. Tire Co.*, 220 U. S. 428, 440-441.

These differences establish, and all the evidence shows, that Kops' garment was not designed by its maker, nor adapted, nor actually used, for the performance of the functions which the Cunningham garments were designed, adapted and constructed to perform. *Topliff v. Topliff and another*, 145 U. S. 156, 161.

Again, the Court below at R. II, 893, said:

> "The District Court was of the opinion that there was a distinction between Kops and Cunningham, in that Kops had no purpose in his invention to apply any appreciable force in uplifting the abdomen or restraining the diaphragm, or even the portion of the body above the breasts. However, *Cunningham does not claim any such purpose*, for in the specification of both of her patents she states that her object is to provide a garment adapted to correctly confine and mold the busts and the abdomen with complete comfort to the wearer and to fit closely above and below the busts without exerting appreciable pressure thereon."

This finding by the Court below not only disregards and ignores the findings of fact made by the District Court

Nos. 30-42, (R. II, 570, 573), but is in direct conflict with the specifications of the two Cunningham patents (R. II, 593, lines 23-50; R. II, 594, lines 17-21; R. II, 601, lines 38-55; R. II, 602, lines 62-64).

Again, the Court below at R. II, 893-4 said:

> "The District Court was further of the opinion that Cunningham distributed tension and pressure to the body of the wearer radially where most desired, and that Kops cannot produce, supply and distribute this tension and force as does Cunningham. *With this conclusion we are unable to agree* for, as we have pointed out, when force is applied to the free end of the triangle there is a reaction at all points between the laterals, no matter how far extended, unless and until they reach a solid and stationary base. This must be true, or the law of Newton in this respect must be held for naught."

But, *nowhere in the whole of Kops' patent is tension, pull or force mentioned.*

In the absence of any disclosure by Kops of the presence or utilization of a force, no law, whether Newton's or another's, with respect to force, has here any pertinence. Kops cannot, without complete reconstruction, produce, supply and distribute tension as does Cunningham. To radiate tension to the desired parts of the front of the figure of the wearer, the steel "stays" of Kops must be removed. The "straps" of Kops must be made the "end sections" of Cunningham and sewed not to the *rear* edges of the "side members" but to the *front* portion of the brassiere and down the edges of the *front* part of the corset. Before Kops can mold the abdomen, he must cease making the lower edge of his straps, connected at their peak with "a horizontally extending tape", extend circumferentially of his garment, and employ, as does petitioner, the diverging forces with

their anchorages as first disclosed and claimed in the patents in suit.

Moreover, since Kops' tape joins horizontally the ends of his "straps" the lower edge of which extends circumferentially of the garment, the only force that Kops could apply would be a straight-line circumferential force. If such straight-line circumferential force had any lateral components (which in such force Newton does not recognize (R. I, 131)), it is obvious that the force would be greater on the busts (where not wanted) than above them where it is desired and supplied by Cunningham to hold the garment snugly against the chest.

And again, at R. II, 894, the Court below said:

> "The elements involved are all old and produce no new result."

But nowhere in the prior art is there any disclosure of end sections having the form and function of the patents in suit.

Nowhere in the prior art is there such an arrangement of flaps, corresponding to the end sections of Cunningham, one part of which is attached to the front of the brassiere and down the edge of the front of the corset, and which also have attached to their opposite free ends elastic straps or forces, anchored, crossed and distributed as in Cunningham.

Nowhere in the entire prior art has anyone ever produced the results which are produced by the garments of Cunningham, which results were demonstrated on living models to the trial court during the testimony of Mrs. Slamin (R. I, 35, et seq.).

It is thus manifest that the Court below has, by its action in the instant case, disregarded and nullified the mandatory provision of Rule 52 (a) of the Federal Rules of Civil Procedure that

> "Findings of fact shall not be set aside unless clearly erroneous, * * *."

In so doing, the Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

The Federal Rules of Civil Procedure were promulgated by this Court pursuant to the Act of June 19, 1934, Chapter 651 (48 Stat. 1064), Section 1 of which provides, inter alia:

> "That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules * * * shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."

The Rules thus have, by statute, the force and effect of law.

Rule 52 (a) provides, in part, as follows:

> "*Effect.* In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In no case, so far as counsel are advised, has the precise meaning and effect of the foregoing italicized portion of the Rule been determined and declared by this Court unless it is the intention of this Court that such provision of the Federal Rules should be construed in conformity

with earlier decisions of this Court declaring the effect to be given, under the general law, to findings of fact by District Courts. In that case the decision of the Court below in the instant case is probably in conflict with the decisions of this Court in *Davis v. Schwartz,* 155 U. S. 631, 636, and *Adamson v. Gilliland,* 242 U. S. 350, 351, holding that "so far as there is any testimony consistent with the finding, it must be treated as unassailable", and with the decision of this Court in *Butte & Superior Co. v. Clark-Montana Co.,* 249 U. S. 12, 30, wherein this Court held:

> "That if the testimony does not show that it (the conclusion of the court) is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong."

But in either event, the construction placed by the Court below upon the foregoing italicized provision of the rule is in conflict with the decisions of other Circuit Courts of Appeals which, by recognizing the mandatory effect of findings made by a District Court under Rule 52 (a), have placed a different construction thereon from that adopted by the Court below. *Strong-Scott Mfg. Co. v. Weller,* 112 F. (2d) 389, 393 (CCA-8) and *Crowell v. Baker Oil Tools,* 99 F. (2d) 574, 577 (CCA-9).

As the Circuit Court of Appeals did not adjudge the findings of fact of the District Court clearly erroneous, the decree of the District Court still stands, as a matter of law, supported and made mandatory by those findings.

It is therefore believed that this Court should, in the interest of clarification and uniformity of action by the lower Federal Courts, now authoritatively define and de-

clare the true meaning, purpose and effect of Rule 52 (a) in accordance with the object and intention sought to be accomplished by this Court in the promulgation of that Rule.

Point II. In Reading Into an Alleged Prior Art Patent and Publication Certain Modifications Not Disclosed Therein, the Only Basis for Which Is Found in the Disclosures and Teachings of the Patents in Suit and Nowhere in the Prior Art, the Court Below Has Decided a Federal Question in a Way Probably in Conflict With an Applicable Decision of This Court.

The foregoing analysis of the opinion of the Court below demonstrates that the decision of the Court below holding the patents in suit anticipated by the Kops Patent No. 1,833,325 and the Princette publication is based not upon the actual disclosures of that patent and publication, but upon the modification and reconstruction thereof made by the Court below in the light of the teachings of the patents here in issue.

Such arbitrary and unwarranted action by the Court below which is thus disclosed as the sole basis for its decision, brings the decision of the Court below into conflict with the applicable and controlling principle of law as enunciated by this Court in the case of *Topliff v. Topliff and Another,* 145 U. S. 156, 161, wherein this Court said:

> "While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer;

but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

Point III. In Reading Into an Alleged Prior Art Patent and Publication Modifications Whose Only Basis Is Found in the Inventions of the Patents in Suit and Nowhere in the Prior Art, and in Thereupon Using Such Modified Prior Art References to Invalidate the Patents in Suit, the Court Below Has Rendered a Decision in Conflict With Decisions of Other Federal Courts Upon the Same Important Question of Federal Law.

This action by the Court below which renders the decision of the Court below probably in conflict with an applicable decision of this Court, likewise and at the same time brings it into conflict with the following decisions, among others, of the Circuit Courts of Appeals of other Circuits, upon the same important question of federal law:

John W. Gottschalk Mfg. Co. v. Springfield Wire & T. Co., 74 F. (2d) 583, 586 (CCA-1);
Firestone Tire & Rubber Co. v. United States Rubber Co., 79 F. (2d) 948, 959 (CCA-6);
Williams Iron Works Co. v. Hughes Tool Co., 109 F. (2d) 500, 506 (CCA-10).

The principle or theory underlying the decisions of the Courts in these cases is forcibly stated in the case of

Western Electric Co. v. Home Tel. Co., 85 Fed. 649, 655-6 (S. D. Ala.) thus:

> "The Supreme Court, in Topliff v. Topliff, 145 U. S. 156, at page 161, 12 Sup. Ct. 828, has said:
>
> " 'It is not sufficient, to constitute an anticipation, that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.'
>
> "The force of this ruling, and the similar ruling in Clough v. Barker, 106 U. S. 175, 1 Sup. Ct. 188, is made manifest, in its practical application to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the status the art has reached. The rights under such later patent are subject to what this record evidence actually shows. *To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties.*"

The conflict between the decision of the Court of Appeals in this case and decisions of other Circuit Courts of Appeals upon the same important federal question, thus resulting from the action of the Court below, should, it is believed, in the interests of the proper and uniform administration of the patent law, be considered and resolved by this Court.

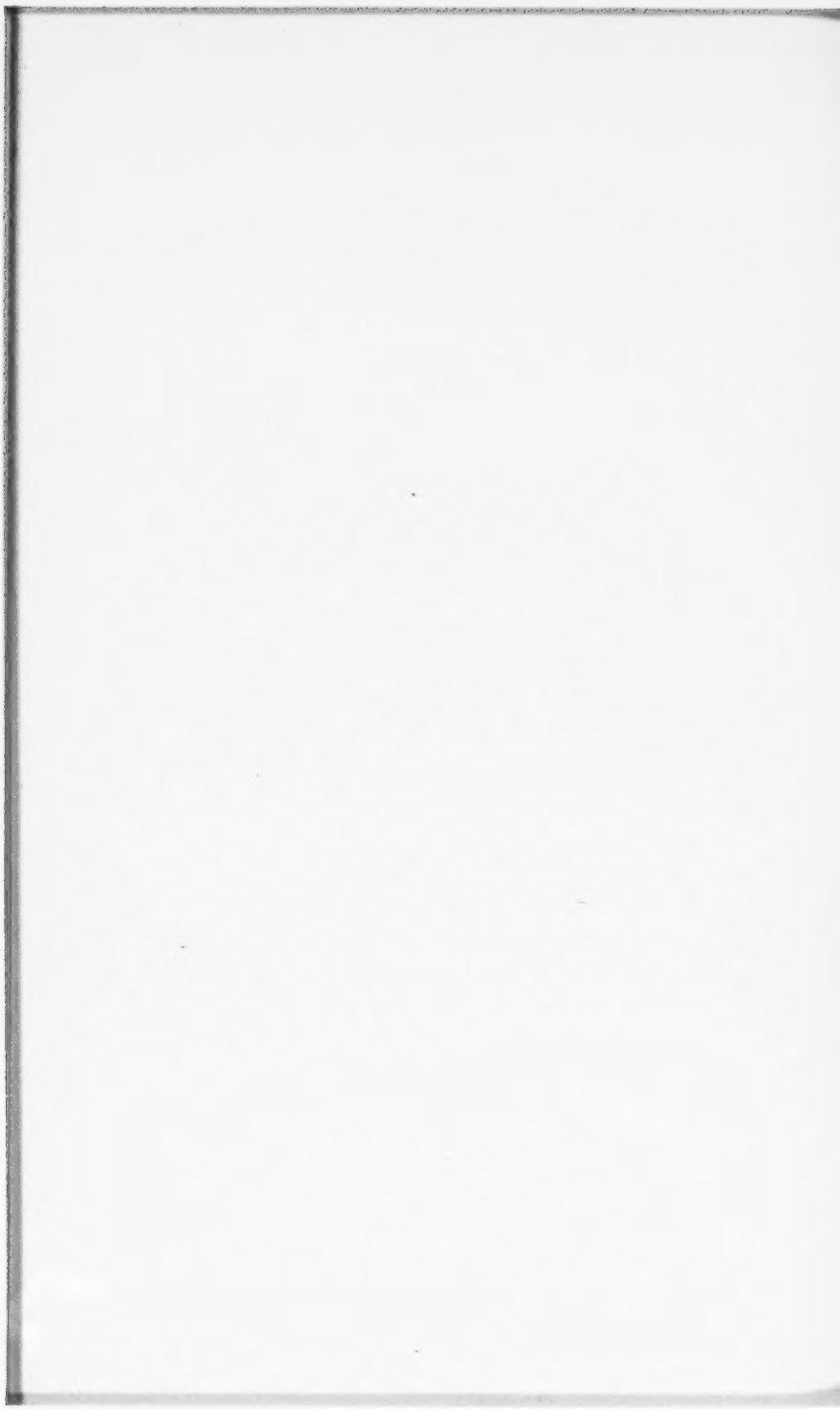
CONCLUSION.

WHEREFORE, petitioner prays that the decision of the Court below be reviewed and reversed by this Honorable Court, and to that end that the writ of certiorari herein prayed for be granted.

Respectfully submitted,

HUGH M. MORRIS,
FREDERIC BURNHAM,
DONALD MALCOLM.

December 20, 1940.



APPENDIX

Princette Publication

Cooperation Between Corset and Ready-to-Wear Departments Means Increased Sales for Both

Recent developments in merchandising are proving to successful retailers the wisdom of close cooperation between various departments in their stores. Perhaps the vogue of the ensemble was important in stressing this. The arrival and acceptance of the Princess silhouette, however, has been directly responsible for arousing the consciousness that there is real profit to both in close cooperation between the corset and ready-to-wear departments.

Of Interest to Buyers

In this connection, we are fortunate in having just received an interesting letter from the sales promotion manager of one of the most important and successful corset firms, who is now making a tour of investigation among the leading corset departments throughout the country.

Because we feel this letter offers a veritable mine of suggestions for successful ways of merchandising corsets we are publishing it for the benefit of corset buyers.—EDITOR'S NOTE.

The newest garment of Kops Bros., known as "Princette" is designed to combine the extremely low decolletage with complete figure control.

A back lace corset especially designed to give the Princess lines to stout figures. Shown by Warner Brothers Co.

FIRST let me say that the corset department has once again become a distinct entity in the stores. Whereas the merchandise man formerly would lift an eye brow when you mentioned corsets, today he smiles and says, "Aha! You boys are in the running again," or words to that effect. This has happened repeatedly to me on this trip.

All Eyes Upon Corset

The corset department has always been one of the most profitable departments in the store, but the "higher ups" thoroughly convinced that no one wore corsets any longer were merely waiting for the department to die a natural death. Today the corset department is the busiest in the store and all eyes are focused upon it.

Merchandise men and store owners have learned that the new style dresses can not be worn without the proper foundations. Consequently they urge their buyers to carry stocks of the new Princess lines, and that is what every up and coming buyer is doing today.

Must Fit Garments

I have with me a line of eighteen samples of new Princess garments ready for delivery November 1st. This line ranged in price from $3 to $25 which is obviously considerably higher than the average price of seasons past. Nevertheless, I find no objections to the higher price ranges.

It has already been demonstrated that the woman who wants the new outer apparel is ready to pay more for the foundation which makes it fit properly. Furthermore the new Princess foundations are distinctly fitting propositions and it has always been true that the woman in the fitting room will pay more for her corset than otherwise.

As to co-operation between the Ready to Wear and the Corset Departments, I will give you a few examples from my own experience.

Cooperation Between Departments

In a store in Columbus, I called three times before being able to catch the corset buyer. It developed that she was out of her department and in the ready-to-wear department supervising the fitting of foundations under the new frocks.

A Cincinnati store has gone so far as to advise all of its customers in the ready-to-wear department first to be fitted to the foundation before trying on new dresses.

A big store in New York State has placed signs in

(Continued on page 104)

DEFENDANT'S EXHIBIT N (Sheet 8).

Princette.

The Newest Nemo-flex Creation

Solves the Most Difficult Princess Mode Problem....
the extremely low decolletage combined with complete figure control.....

NO FINER molding garment has ever been produced. Light, flexible, beautiful yet really controlling—unquestionably the correct foundation for the Princess silhouette. The lines of the brassiere are so cut that an extremely low decolletage is possible without sacrifice of the necessary restraining qualities. Clever seaming and boning control the figure admirably. Ask the Nemo-flex representative about it.

Princette . . . No. 16-165
Made of lace, French silk batiste and French silk elastic, uplift bust and extremely low back. Ribbon elastic shoulder straps and tie garters. *To retail at* $16.50

KOPS BROS., Inc., 120 East 16th Street,
New York, N. Y.

Nemo-flex Anticipates the Mode

FILED
JAN 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 644.

THE H. W. GOSSARD CO.,
Petitioner,

v.

LOEBER'S, INC.,
Respondent.

Petitioner's Reply to Brief for Respondent.

HUGH M. MORRIS,
FREDERIC BURNHAM,
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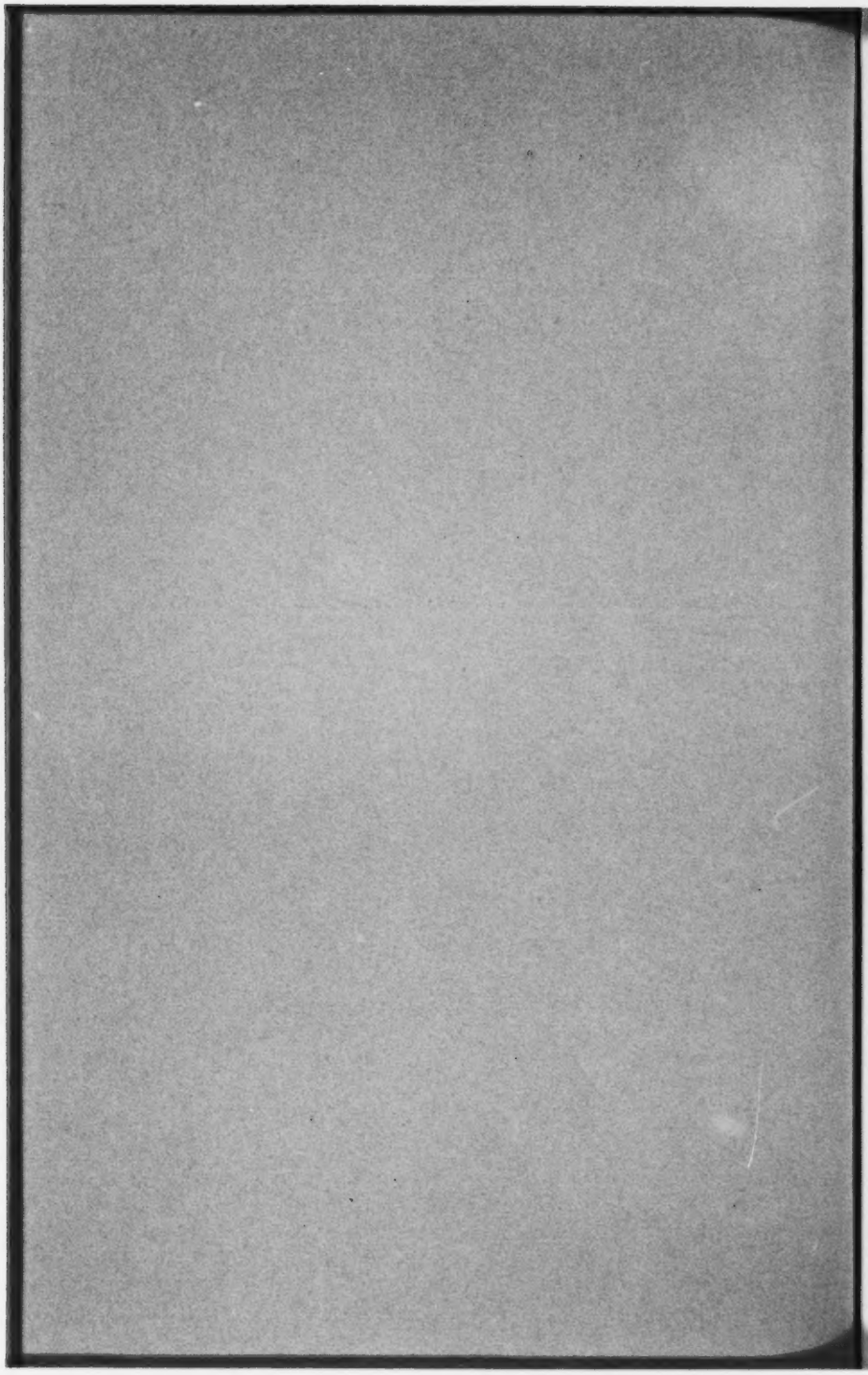

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IN THE

Supreme Court of the United States.

October Term, 1940.

No. 644.

THE H. W. GOSSARD CO.,
Petitioner,

v.

LOEBER'S, INC.,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

I.

Respondent's brief does not touch any one of the grounds for allowance of the writ here asserted by petitioner.

These are:

(1) That the Court below reversed the decree of the District Court without even referring to the *fact findings* of the District Court which controlled its *ultimate conclusions,* much less adjudging *such findings* "clearly erroneous"; that in so doing the Court below disregarded and nullified the express mandatory provision of Rule 52 (a) of the Federal Rules of Civil Procedure that "*Findings of fact* shall not be set aside unless clearly erroneous"; and that the decision of the Court below thus raises an important question of fed-

eral law which has not been, but should be, settled by this Court.

This question, involving as it does the proper administration of law and procedure in every case brought before a Circuit Court of Appeals, is believed to be a question of the most immediate and widespread public importance, and one which should be passed upon and settled by this Court.

(2) That the Court below not only disregarded the findings of fact made by the District Court upon clear and uncontradicted evidence, but arbitrarily substituted for the findings of the District Court, findings of its own which are nowhere supported or justified by the evidence, and the only basis for which is found in the disclosures of the patents in suit; and that the Court below thereby rendered a decision which is not only probably in conflict with the applicable decision of this Court in *Topliff v. Topliff and Another,* 145 U. S. 156, 161, upon the same fundamental question of patent law, but which is in direct and irreconcilable conflict with the decisions of other Circuit Courts of Appeals upon the same question. *John W. Gottschalk Mfg. Co. v. Springfield Wire & T. Co.,* 74 F. (2d) 583, 586 (CCA-1); *Firestone Tire & Rubber Co. v. United States Rubber Co.,* 79 F. (2d) 948, 959 (CCA-6); *Williams Iron Works Co. v. Hughes Tool Co.,* 109 F. (2d) 500, 506 (CCA-10).

The circumstance that these questions arise in a patent infringement suit in which there is no conflicting decision of another Circuit Court of Appeals with regard to the same patents, does not, we believe, as respondent's brief seems to indicate, call for the summary refusal by this Court to pass

upon such questions in the interests of proper and uniform administration of the laws and the correction of manifest error.

With respect to the foregoing reasons relied upon by the Petitioner for allowance of the Writ, respondent states (brief p. 3) that:

> "The Court of Appeals below quite definitely indicated that it found the findings of the District Court to be 'clearly erroneous'."

Respondent, however, fails to point out by reference to the opinion of the Court below a single instance in which that Court so much as referred to any *fact finding* of the District Court with regard to either of the alleged prior art references upon which the Court below relied in holding want of invention in the Patents in suit, and Petitioner can find none. It is obvious that the Court below disagreed with the *ultimate legal conclusions* of the District Court, but that is a far different thing from the setting aside of the *findings of fact* of the District Court because "clearly erroneous".

Again, respondent seeks to minimize the findings of the District Court by stating that the findings were prepared by counsel for Petitioner and that "the District Court is purported to have made ninety-three separate findings of fact in a simple patent infringement suit involving most trivial subject matter." The first of these contentions, of course, needs no comment. With respect to the second, it need only be said that of such ninety-three findings, the greater part thereof were necessitated by various untenable arguments raised by respondent and the fact that respondent itself put in evidence some forty-two patents and publications in an attempt to show want of invention in the patents in suit, and

that while the District Court made but five findings of fact with respect to the Kops Patent and the Princette Publication, upon which the Court below relied to invalidate the patents in suit for want of invention, that Court did not make mention of, much less adjudge "clearly erroneous", even these five findings of fact or any thereof.

Petitioner does not argue (respondent's brief p. 3) that findings made by the District Court may not be assailed on appeal. Petitioner here contends only that none of such *findings* were assailed by the Court below or found "clearly erroneous".

II.

Respondent asserts (brief pp. 1, 2) that the first patent here in suit has previously been held invalid by the Court of Appeals for the Sixth Circuit in *Loeber Hair Goods Co. v. H. W. Gossard Co.*, 87 Fed. (2d) 98, because anticipated by and wanting in invention over the prior art.

Petitioner did not believe it necessary to refer to that decision in its petition or brief herein, for the reason that certain evidence which was determinative of the decision by the Circuit Court of Appeals for the Sixth Circuit in the earlier case was here established and found by both Courts below to be unreliable and false. Such evidence related to the so-called Dumont or French alleged prior art garment.

Thus, in *Loeber Hair Goods Company v. H. W. Gossard Co.*, 87 Fed. (2d) 98, 100, the Circuit Court of Appeals for the Sixth Circuit said:

> "*Given the French Garment,* it was an obvious step to sew the brassiere to the upper part of the corset instead of buttoning it thereto and to sew its end sections down along the seam of the corset, all as in the second patent to Kops, or the 'Princette' garment."

while in the case at bar, the Court below, speaking of the Dumont or French garment, said, (R. II, 895):

> "The Circuit Court of Appeals for the Sixth Circuit held that the first patent of Cunningham was invalid because of anticipation, want of invention and prior public knowledge. *Loeber Hair Goods Co. v. Gossard Co.*, 87 F. 2d 98, decided before suit was filed in this case. That decision is based partly upon what is referred to in the record as the French garment. This was said to have been imported in 1930, and was in the possession of appellee at the time depositions were taken in the first case. It unquestionably exhibits everything disclosed by Cunningham. However, a sharp controversy arose in the case at bar over the credibility of the witnesses who gave the evidence with respect to the French garment. It so impressed the District Court in this case that he declined to believe their testimony, and for this reason chose not to follow the decision of the Sixth Circuit. We accept his ruling in this respect."

The Petition should be granted.

Respectfully submitted,

HUGH M. MORRIS,
FREDERIC BURNHAM,
DONALD MALCOLM,
Counsel for Petitioner.

Office - Supreme Court, U.S.
FILED
DEC 30 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940

No. 644.

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vs.

LOEBER'S, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
FLOYD H. CREWS,
Counsel for Respondent.

IN THE

Supreme Court of the United States

October Term, 1940

No. 644

THE H. W. GOSSARD COMPANY,
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LOEBER'S, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

This is an ordinary patent case, the sole issue being validity. No public interest is involved, nor is any novel question of law presented.

The suit involves two patents to the same patentee, the second of which is for a most trivial and unpatentable modification of the first. This suit is the only one in which the second patent has been involved. The first patent has previously been held to be invalid by the Court of Appeals for the Sixth Circuit in *Loeber Hair Goods Company* v. *H. W. Gossard Company,* 87 Fed. (2d) 98—a fact which the petition nowhere mentions. In consequence, there is no conflict of opinion of Circuit Courts of Appeals.

Under these circumstances, according to previous decisions of this Court, this case is not one in which a writ of certiorari will be granted. *Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319; *Layne & B. Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *General Talking Pictures Corp.* v. *Western Electric Co. et al.*, 304 U. S. 175, 179.

II.

With respect to the merits of the petition, the Courts of Appeals for both the Sixth and Seventh Circuits unanimously found that the first patent was anticipated by and wanting in invention over the prior art. The alleged invention consists merely in sewing a brassiere to the top of a corset, with the side flaps of the brassiere sewn to the side of the corset to about the waistline and terminating in elastic straps which cross each other in the back of the corset to be detachably secured thereto. The prior patent to Kops (Vol. II, R. 814) and a prior Princette garment (Vol. II, R. 533, 535), shows the utter want of novelty or invention, as is self evident upon a mere comparison of the claims with the disclosures of those publications, and as both Circuit Courts of Appeals held.

The second patent (which, as above stated, has never been in litigation before) differs from the first merely and solely by making the elastic attachment means for the flap ends of the brassiere portion of the garment of *three* elastics instead of *two* elastics as in the first patent.

III.

The petition is predicated upon an alleged sanctity of Findings of Fact by the Trial Court in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil

Procedure. A sufficient answer to petitioner's entire argument on the subject is that the rule specifically excepts from its mandate findings of the Trial Court which are "clearly erroneous". The Court of Appeals below quite definitely indicated that it found the findings of the District Court to be clearly erroneous.

Moreover, it is self evident that this rule was never intended to have application to the ordinary issues of invention and anticipation in patent litigation, otherwise there would result an unwarranted practice that can be no better illustrated than by the present case. Here, the District Judge, in an oral opinion at the conclusion of the trial, declined to follow the decision of the Court of Appeals for the Sixth Circuit as to the first Cunningham patent, and concluded with the statement (Vol. II, p. 566):

> "The result of what I have said is that plaintiff may prepare and within a short date and on notice present findings of fact and conclusions of law not inconsistent with what I have stated."

As a result, the findings were framed in language of petitioner's own choosing, and were presented to the District Judge who signed them as one might sign a blank check. Thus, as appears from the record (Vol. II, pp. 567 *et seq.*), the District Court is purported to have made *ninety-three separate findings of fact* in a simple patent infringement suit involving most trivial subject matter. And petitioner argues therefrom, in effect, that *none* of these findings may be assailed on an appeal. In effect, the argument resolves itself into the assertion that a defendant in a patent infringement suit is deprived of an appeal even where, as here, a District Judge fails or refuses to follow a superior Court on the same evidence.

Obviously, Rule 52(a) was never intended for any such purpose; and, as worded, permits no such construction.

IV.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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